

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

Supreme Court, U. S.
FILED

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October Term

Case No.

77-505

DONALD C. IRWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO

**THE UNITED STATES COURT OF APPEALS FOR
FOR THE TENTH CIRCUIT**

Of counsel:

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To: The Chief Justice, and, the Associate Justices
of the Supreme Court of the United States of
America.

Comes, now, Donald C. Irwin, petitioner pro se,
who petitions this Court to issue a writ of Certiorari
to the U.S. Court of Appeals for the Tenth
Circuit.

2.

As grounds, the Petitioner Irwin shows the Court as follows:

I.
OFFICIAL AND UNOFFICIAL REPORTS
OF OPINIONS

The Opinion of the Court of Appeals for the Tenth Circuit in U. S. v Irwin, decided and filed August 8, 1977, Case No. 76-1933, and is attached hereto as Appendix "A".

To Petitioner's knowledge there has been no unofficial report made of the denial of Petitioner's "Motion for a Rehearing" filed on the 6th of September, 1977.

The Order of the Court of Appeals is attached hereto as Appendix "B".

II.
JURISDICTIONAL STATEMENT

Jurisdiction is obtained under Amendment I., U.S. Constitution - the right to petition the Government for a redress of grievances, and, under Amendment IX. - the right to have the issuance of a writ of Certiorari under the Common Law.

Jurisdiction is also obtained under Statutory Law as set out in 28 U.S.C. 1651 and 1254.

Jurisdiction is further obtained under Statutory Law as set out in 28 U.S.C. _____ allowing the Supreme Court to make their own Rules.

Rule 19 is invoked requiring the Court's power of supervision over the Courts of Appeals when such Court has rendered a decision in conflict with the decision of another court of appeals on the same matter; and has decided an important question of Federal law which has not been, but should be, settled by this Court; and has decided a Federal question in a way in conflict with applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court.

III.
JUDGMENT TO BE REVIEWED

The Judgment to be reviewed was decided and filed on August 8, 1977, wherein the Tenth Circuit Court of Appeals affirmed the judgment of conviction. See attached Appendix "A".

The Order denying Petitioner's Motion for Re-Hearing is dated September 6, 1977. See attached Appendix "B".

IV.

QUESTIONS PRESENTED FOR REVIEW

A. ASSISTANCE OF COUNSEL:

Whether the Petitioner was denied his right to defend in person, with assistance of counsel; and whether the Petitioner was denied the right to have the assistance of counsel as guaranteed by the Federal Constitution's Sixth Amendment; and whether the word counsel, as set forth in the Sixth Amendment, means licensed attorney.

B. DISCRIMINATION:

Whether the Court can allow Respondent's layman representative, while at the same time denying Petitioner's layman representative, without denying Petitioner equal protection, due process and freedom from discrimination.

C. GOOD FAITH CLAIM OF PRIVILEGE:

Whether a good faith claim of one's rights can be converted into a crime, and can one be penalized for exercising his rights under the Constitution.

V.

STATEMENT OF THE CASE

On July 7, 1976 an Information was filed, and a Summons directing Petitioner to appear was filed on July 9, 1976.

The Information alleged that Petitioner had violated the section under Title 26 of the Internal Revenue Code 7203, Willful Failure to File Income Tax Return for the calendar year 1974.

Arraignment was held on July 23, 1976. Petitioner filed various motions and a hearing on motions was held on July 30, 1976.

The Trial Court had entered an Order on July 26, 1976 holding that the Petitioner was not entitled to court-appointed counsel and that the Petitioner may elect to appear pro se or through retained counsel.

After a Preliminary Hearing held on July 30, 1976, Petitioner was bound over to U.S. District Court and a one day trial was held on August 3, 1976, the Honorable Ewing T. Kerr presiding where the Petitioner was convicted.

Various pre-trial motions were filed by the Petitioner, among these were:

1. Motion For Preliminary Examination which was granted, and at the preliminary hearing, Petitioner's counsel was ordered removed from the proceedings.

2. Motion For A List Of Respondent's Witnesses, which was granted.

3. Notice of Motion and Motion To Inspect And Copy Records, Papers And Other Relevant Material, re. Jury Selection Process, and the motion was granted. However, the Judge would not grant a Motion For Continuance of trial in order to give Petitioner time to copy and inspect; therefore, through the process of rushing the trial -- Petitioner was in effect denied the motion at least for the purpose of trial.

4. Petitioner filed a Motion To Dismiss based on the Supreme Court's ruling in Garner,^{1/} the motion was denied.

5. Motion For A Change Of Venue was filed on the 30th day of July which was denied.

6. Notice of Appointed Counsel or Co-Counsel, which Petitioner had entered into a contractual agreement with, to assist him at trial and the Court would not let chosen counsel sit at the table with Petitioner anytime during the trial.

7. Petitioner filed an affidavit showing he felt himself incompetent to put forth a good defense without the help of counsel, and he contacted several lawyers which would not take the case for various reasons which Petitioner believes to be to shortness of time to prepare for trial, and the fear lawyers have of the Internal Revenue Service's retaliation. Also, Petitioner believes religiously ^{2/} that one should not hire lawyers and the court in its attempt to give court appointed lawyer sought to force Petitioner to waive his right to remain silent in order to obtain his right to counsel.

8. Petitioner filed various other motions including a Motion For Continuance Of Trial. It should be noted that ten (10) days after arraignment, Petitioner was forced to trial and was denied his chosen assistant even to sit with him at counsel table.

^{2/} Volume I, Page 69.

VI.

ARGUMENT

A.

ASSISTANCE OF COUNSEL

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO DEFEND IN PERSON WITH ASSISTANCE OF COUNSEL, AND WHETHER THE PETITIONER WAS DENIED THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FEDERAL CONSTITUTION'S SIXTH AMENDMENT, ^{1/} AND WHETHER THE WORD COUNSEL AS SETFORTH IN THE SIXTH AMENDMENT MEANS LICENSED ATTORNEY.

Petitioner, Irwin, was denied his right to defend in person by the fact that the court would not let him have his chosen assistant sit at counsel table with him.

The Supreme Court has recently ruled that a defendant in a criminal trial has the right to defend himself. ^{2/}

^{1/} The Sixth Amendment to the U.S. Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

^{2/} Faretta v California, *supra*.

How then, by any amount of reasoning, can Petitioner be denied his planning through trusted helper and assistant -- the defense of his own trial.

The right to defend in one's own trial is evidence enough to prove that he should be allowed to plan his defense using anyone to assist him in putting forth a good defense, subject only to the orderly rules of the court.

The complete removal from Petitioner's side his helper or assistant whom he had relied upon to assist him in defending himself in his trial was totally a denial of due process and a denial of his own right to defend in person. This act smacks the arbitrary injustice which followed the Crown prior to the signing of the Declaration of Independence.

On appeal the Tenth Circuit found that: (Appendix A, Page 2)

"...the Sixth Amendment does not provide the right to representation by a lay person. "Counsel" refers to a person authorized to practice law.

Petitioner contends that this subject must be cleared up, and that a great division among the courts is causing uncertainty as to what rights

defendants in criminal cases have in the area of counsel, right to defend in person, etc.

Most all courts will admit that a defendant has the right to defend himself; however, then they start by interfering with that right when they deny the defendant his chosen spokesman or representative.

They seem to be saying; yes, you can defend yourself; however, I am not going to give you the same advantage as I will a lawyer and you will have to sit at counsel table alone unless you want to hire one of my colleagues who is an officer of this court.

It should be noted in this instant case that Plaintiff had sitting at their counsel table layman assistance. ^{3/}

Is this the court's boasted declaration that the defendant has the right to defend himself? Petitioner contends the court denied his right to defend himself by denying his planned defense and the Tenth Circuit condoned this action without blinking.

Petitioner contends that if he has the right to defend himself in a criminal trial -- that the judge in that trial can in no way interfere in that right by restricting that planned defense by not allowing assistance to sit at counsel table, regardless or authorization to practice law or not.

The Court of Appeals disregarded the fact that the word "assistance" is commonly understood to mean help or aid by an auxiliary or subordiante. As stated in the Sixth Amendment, the accused has the right to the "assistance" of Counsel for his defense -- meaning, of course, that Counsel is to "assist" the accused. The very common practice today, however, of an attorney "taking over" and "running" the defense entirely, with the accused acting as "assistant," is a reversal of the way things were meant to be. Should the accused wish to allow the attorney to "run" the case, he is free to do so, but should he not wish to allow the attorney to "run" the case, he -- the accused -- is protected by the supreme Law of the Land from being forced to do so, the Sixth Amendment directing that Counsel in all criminal prosecutions assist the accused defendant. The accused may also choose to raise "assistant" Counsel to "co-Counsel" status, but the prerogative is, by law, the accused's.

3/ Trial Transcript, Page 19 line 19, 20, 21 and 22.

It is particularly worthy of note that the Sixth Amendment commands that the accused "shall enjoy" -- or take pleasure in -- all who assist him as Counsel; and that any of the above-mentioned displeasures which might evolve would be reason enough to dismiss that Counsel and replace him with someone else more compatible with his designs who can and will act in a constructive way. The Sixth Amendment places this judgement squarely in the hands of the accused, not the Court, and nowhere in the U.S. Constitution is any specific power granted by We, the People, to the Judiciary to control who shall or who shall not act as Counsel for an accused. This Court is reminded that, according to the Ninth and Tenth Amendments, the United States and State governments have only those powers delegated to it by the Constitution, and that those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People," and that "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the People."

Reference to the common law is both necessary and desirable to proper understanding and interpretation of the U.S. Constitution, especially the first ten amendments, The Bill of Rights. We find one expression of that common law in a citation from

perhaps the most influential of the Colonial documents protecting human rights, The Pennsylvania Frame of Government of 1682.^{4/} No limit of qualification was intended to be put upon the right of an accused to enjoy the assistance of Counsel for his defense in the Sixth Amendment and Petitioner herein submits the word "Counsel" was used so as to keep the way open for friends of the accused as well as for lawyers, licensed or non-licensed.

The trial court plainly erred when it told Petitioner that, "If you want to talk to him in the halls during the trial of the case, you are at liberty. He cannot sit at the table with you."^{5/}

Such audacity, such tyranny and such discrimination. The Petitioner had the right to defend himself, and the court had no right or duty to step in and attempt to hinder or abuse that right by taking away Petitioner's helper, except in the halls, and then in like circumstance allow Plaintiff-Respondent layman "assistance" and layman "representative."^{6/}

4/ The Pennsylvania Frame of Government of 1682.

"That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends...."

5/ Hearing on Motions, Page 10 line 16, 17 and 18.

6/ Trial Proceedings at Page 19 line 19, 20, 21, 22.

The error of invidious discrimination is apparent in this present action because Petitioner chose to defend himself. The court evidently felt compelled to punish him for that decision and the Appeals Court affirmed that error with an extremely short amount of words. (Appendix A Page 2 and 3).

The District Court Record shows that Anderson and Mason were not permitted to assist the Petitioner -- not because they had "no training in law"^{7/} but, rather, because they were "not members of the Bar of this or any other Court" (R-24). Furthermore, there was no hearing held by the District Court to determine if they were or were not "learned in the law" or, if they had had any training in the law". Instead, assistance of Counsel was denied summarily.

Petitioner's Motion For Rehearing pointed out to the Appeals Court that it was confusing "representation", with "assistance" of counsel.

Petitioner did not ask for Anderson or Mason to "try the case". As this Supreme Court said in *Faretta v California*, 43 LW 5004: (at ____).

"It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to

the counsel the power to make binding decisions of trial strategy in many cases. (Citations omitted here).

Instead, Petitioner was only asking the District Court for the right to "plead and manage (his) own cause () personally (with) the assistance of... .counsel". See Section 35, Judiciary Act of 1789 (Chap. 20, §35, 1 Stat. 92, now codified as 28 USC 1654 (1970). ^{8/}

As this Supreme Court further said in *Faretta*, supra: (at ____)

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation", who must be accorded "compulsory process for obtaining witnesses in his favor". Although not stated in the Amendment in so many words, the right of self-representation -- to make one's own de-

^{8/} The amendment to this Section alters the phrase "by the assistance of such counsel or attorney at law" to read only "by counsel". This alteration is repugnant to the U.S. Constitution, Sixth Amendment.

^{7/} a determination made without the taking of evidence.

fense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequence if the defense fails.

Petitioner contends that if this Court, in Faretta, *supra*, held that a State could not force a lawyer upon a Defendant Party since "(t)he right to defend is given directly to the accused", then, Petitioner should have been granted the assistance of Anderson and Mason -- to counsel him, "for it is he (the Petitioner) who suffers the consequence if the defense fails".

Petitioner further contends that by being deprived the active participation of his chosen "counsel" he was deprived the right of making his own defense from the Witness Stand - under Oath!

If he had taken the Witness Stand, there would have been no one to object for him on cross-examination when the Prosecutor asked predictable self-incriminating questions for the purpose of prejudice and conviction, whether admissible by the rules of evidence or not.

While the Tenth Circuit asserts that "Counsel refers to a person authorized to practice law".

The Sixth Circuit ^{9/} judicially notes that neither its circuit nor the Supreme Court has ever passed upon the precise question presented by Petitioner; to-wit: Does the Sixth Amendment provide the unqualified ^{10/} right to enjoy the assistance of counsel?

The Sixth Circuit goes on to state in *U.S. v Roger L. Whitesel* that:

In fact, as appellant points out, in the Supreme Court's most recent construction of the Sixth Amendment, wherein it upheld a criminal defendant's right to self-representation, it employed language which suggests that there may well be a distinction between the term "counsel" as used in the Sixth Amendment and the term "attorney-at-law".

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers.

When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General or Solicitors-General of

^{9/} *U.S. v Roger L. Whitesel*, No. 75-1648 page 4 Sixth Circuit courts Opinion, "Nevertheless the question posed by this appeal has never been passed upon either by this Court or by the U.S Supreme Court."

^{10/} See *Chandler v Fretag*, 348 US 3 which states: "...his right to be heard through his own counsel is unqualified".

of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained strength in the Colonies where "distrust of lawyers became an institution". Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class". In the heat of these sentiments the Constitution was forged. *Faretta v California*, 422 U.S. 806, 826-27 (1975). (Footnotes omitted)

The Sixth Circuit ruled against Whitesel, possibly because unlike this case the court allowed Whitesel to have a layman sit at counsel table with him.

The denial of assistance to even sit at counsel table was a denial of the right to enjoy the assistance of counsel as set forth in the Sixth Amendment, and the right to conduct one's own defense includes the right to seek assistance from one of a Defendant's

own choosing.

WHEREFORE, PETITIONER REQUESTS THIS COURT TO ISSUE A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

B.
DISCRIMINATION

WHETHER THE COURT CAN ALLOW RESPONDENT'S LAYMAN REPRESENTATIVE, WHILE AT THE SAME TIME DENYING PETITIONER'S LAYMAN REPRESENTATIVE, WITHOUT DENYING PETITIONER EQUAL PROTECTION, DUE PROCESS AND FREEDOM FROM DISCRIMINATION.

Discrimination by the court and the Court of Appeals tends to state that the judge in this instant case had the authority to allow the United States, as Plaintiff, the right to layman representative and layman assistance,^{1/} while at the same time denying that same right to Petitioner.

The opening statement by the prosecutor bears this contention out:

1/ "present at counsel table with me is a representative of the Government, Mr. Ken Thomas. He will be assisting me throughout the trial with the various exhibits that we will offer into evidence.

Mr. Ken Thomas is a layman assistant and a

layman representative.

There can be no doubt that the court carried on discrimination 2/ against the Petitioner, and the extent of discrimination constituted denial of due process.

The fairness of procedure is due process 3/ and the court in no way was fair by treating Plaintiff different than Petitioner, and denying Petitioner his chosen assistant even to sit at the table with him.

WHEREFORE, AS A CONSEQUENCE OF THE COURT'S DENIAL OF DUE PROCESS AND THE SANCTIONING OF THE ERROR BY THE TENTH CIRCUIT COURT, THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION AND GRANT THE WRIT OF CERTIORARI.

2/ "Discrimination is the act of treating differently two persons or things under like circumstances". Nat'l. Life Ins. Co. v U.S., 277 US 508, 630.

3/ "Fairness of procedure is 'due process' in the primary sense". Justice Frankfurter - Joint Anti-Fascist Ref. Comm. v McGrath, 341 U.S. 123, 161.

C.

GOOD FAITH CLAIM OF PRIVILEGE

WHETHER A GOOD FAITH CLAIM OF ONE'S RIGHTS CAN BE CONVERTED INTO A CRIME, AND CAN ONE BE PENALIZED FOR EXERCISING HIS RIGHTS UNDER THE CONSTITUTION.

Petitioner herein asserts that a good faith claim of privilege, even if erroneous, cannot be a basis for his conviction under 26 USC 7203; and the Tenth Circuit Court of Appeals is erroneously reading Garner ^{1/} and Sullivan ^{2/} and are overruling both with their application of Porth ^{3/}

Petitioner filed his 1040 Return for the year 1974, and relying on this Court and various other court cases he claimed his rights as to specific questions on the form.

It seems entirely lost upon far too many courts that the 'Fifth' is for the innocent, as well as the guilty.

1/ Garner v U.S., 424 U. S. 648 (1976)

2/ United States v Sullivan, 274 U.S. 259 (1927)

3/ United States v Porth, 462 F 2d 519 (10th Cir. 1970)

"Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men. Too many, even those who should be advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. The privilege serves to protect the innocent who might otherwise be ensnared in ambiguous circumstances." Gruenwald v U.S., (1957) 353 U.S. 391, 1 L Ed. 2d 931, 952, 77 S. Ct. 963, 982, 62 ALR 2d 1344.

In 1964, this Court spoke of the right to be free from self-incrimination as, "an important advance in the development of our liberty" and that:

"...our sense of fair play which dictates 'a fair state-individual balance, by requiring the government in its contest with the individual to sholder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' ... and our realization that the privilege, while sometimes 'a shelter to the guilty' is often a protection to the innocent.'" Murphy v

Waterfront Com. of N.Y. Harbor, (1964) 378 U.S. 52, 12 L. Ed. 2d 678, 681-82, 84 S. Ct. 1594.

And this Court has held that:

"This 'willful' qualification fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court BEFORE obedience is compelled." Federal Power Comm. v Metropolitan Edison Co., 304 U.S. 375.

This Court has ruled in the Garner case (Garner v U.S., 424 U.S., 424 U.S. 648) that:

"The information revealed in the preparation and filing of an income tax return is, for the purpose of Fifth Amendment analysis, the testimony of a 'witness'!"

Garner, *supra*, (1976).

The Garner Court then went on to say that:

"... a valid claim of privilege cannot be the basis for a Section 7203 conviction..."

Petitioner believes that he did make a valid claim of his Fifth Amendment privilege and that therefore, his conviction should be reversed. He cannot be forced to be a 'witness' against himself, and then prosecuted when he takes the Fifth Amendment.

All Petitioner tried to do was to exercise his constitutional rights as best he knew how, through attachments submitted in support of his 1040 Return.

The attempt is clear and should be honored. To answer his attempt with arrest and prosecution is in itself a violation of the law of the land, on which Petitioner relied in his attachments, and which all agents of government are sworn to uphold.

"The claim and exercise of a constitutional right cannot be converted into a crime."

Miller v U.S., 230 F. 2d 946 (1973).

Even persons suspected of subversion and of endangering the national security have their constitutional rights honored. U.S. v U.S. District Court, (1972) 407 U.S. 297. Petitioner is entitled to equal protection of his constitutional rights.

The Ninth Circuit declared in 1973 that:

"... there can be no sanction or penalty imposed upon one because of his exercise of constitutional right."

Considering that said tax 'return' is to be signed under penalty of perjury, Petitioner had no alternative to filing as he did. The slightest error, even if made inadvertently, could be viewed as fraud, if the government chose to view it that way, making any filing, in the best of faith, risky for people who have political and economic ideas which may vary from the 'party line', i.e. government policy.

The Tenth Circuit Court of Appeals admits that a "valid claim of privilege could be asserted as to specific items of information requested" ^{4/} and they go on to say that, "If such claim were valid, the taxpayer could not be prosecuted for violating 26 USC Section 7203."

Nowhere in the record did the courts rule that Petitioner's claim was not valid, and even if held invalid, a good faith assertion of the privilege is a defense to a §7203 prosecution ^{5/}.

Mr. Justice Marshall and Mr. Justice Brennan both concurring in Garner with the other six judges stated:

"This case ultimately turns on a simple question - whether the possibility of being prosecuted under 26 USC §7203 for failure to make a return compels a taxpayers to make incriminating disclosures rather than claim the privilege against self-incrimination on his return. In discussing this question, the court notes that only a "willfull" failure to make a return is punishable under §7203 and that"

a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." ante at 15 n 18. Since good faith erroneous assertion of the privilege does not expose a taxpayer to criminal liability, I would hold that the threat of prosecution does not compel incriminating disclosures in violation of the Fifth Amendment. The protection accorded a good-faith assertion of the privilege effectively preserves the taxpayer's FREEDOM to choose between making incriminating disclosures and claiming his Fifth Amendment privilege, and I would affirm the judgement of the Court of Appeals for that reason" (emphasis added).

Petitioner had attached to the motion to dismiss an affidavit asserting that the "questions objected to on the form if answered could incriminate" and that "at all times Defendant was acting in good faith". The government failed to file any opposing affidavits and the failure to do so proved beyond any reasonable doubt that at that time no crime had been committed.

4/ Appendix A Page 7 citing *Garner v U. S.* supra.

5/ *Garner v United States* US (1976) U.S.T.C. 1301,

44 USLW 4326 76-1

VII.
CONCLUSION

Petitioner hereby invokes Rule 19, Rules of the Supreme Court, in order to preserve those rights which the Founding Fathers fought and died for, and established for us by inserting them in our Constitution for all to know.

Petitioner asks the Court to take judicial notice that The Bill of Rights only declares those rights which Petitioner had before government was instituted, and He who gave those rights can be the only one who can take them away. We have created a government for the sole purpose of preserving those rights, and the Tenth Circuit has, as Petitioner has shown:

1. Rendered a decision contrary to other Circuits such as the Sixth Circuit.
2. Has decided an important question of Federal Law such as -- that Petitioner has no right to layman assistance or layman counsel or layman co-counsel when defending against a criminal action and this question has not been, but should be settled by this Court.

3. Has decided that the word "willful" in conflict to rulings by this Court.
4. Has attempted to overturn Sullivan and Garner by using their erroneous decision in Porth.
5. Has departed from the elementary standards of due process to allow obvious discrimination by the lower court.
6. Has attempted to narrow the Fifth Amendment to protect only criminals -- by declaring that the Petitioner needed to show why disclosures would incriminate while ignoring the fact that the record reflects that Petitioner did make a showing of how disclosures would incriminate.
7. Has ignored the showing of good faith, rendering Petitioner's trial a farse and a tool of the lower court to help the Internal Revenue Service in an attempt to intimidate the populace in order to get them to waive their rights.

American Justice cannot long tolerate one rule of law to govern the prosecution and a different rule of law to govern the defense. Decency alone

requires that the defense should have the same treatment as the prosecution.

The Petitioner in this case chose to defend himself, and the court took it upon itself to make it as hard as possible for the Petitioner. It is hard enough for a pro se litigant to weave his way through a maze of court rules, but when the judge denies the defense a layman to sit at the table to assist him in his defense the court becomes the unfair umpire and justice falters and fades away.

Petitioner requests the Court to issue a Writ of Certiorari and review the error in the courts below -- the effect of which has been to deprive Petitioner and others who may choose to defend themselves of their inalienable right to defend and conduct their own defense through and by the assistance of whom they may choose subject of course to the orderly conduct required by the Courts.

VIII.
PRAYER

WHEREFORE, PETITIONER, IRWIN, PRAYS THAT THE SUPREME COURT WILL ISSUE A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Donald C. Irwin

DONALD C. IRWIN

Petitioner pro se

Star Route 2, Box 169
Green River, Wyoming 82935

Dated: September 30, 1977.

CERTIFICATE OF SERVICE

I certify that I have this 30th day of September, 1977, mailed, postage prepaid, three (3) copies of this petition to the Solicitor General, Department of Justice, Washington, D. C. 20530.

Signed *Donald C. Irwin*

APPENDIX "A"

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.) No. 76-1933
DONALD C. IRWIN,)
Defendant-Appellant.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. 76-64-K)

Submitted on the briefs.

Donald C. Irwin, Defendant-Appellant, Green River, Wyoming,
pro se.

Toshiro Suyematsu, United States Attorney; Jerome F. Statkus,
Assistant United States Attorney; Frederic C. Reed, Assistant
United States Attorney, Cheyenne, Wyoming, for Plaintiff-
Appellee.

Before HILL, SETH, and McWILLIAMS, United States Circuit
Judges.

HILL, Circuit Judge.

Donald C. Irwin appeals his conviction by a jury
in the United States District Court for the District of
Wyoming for willful failure to make an income tax return for
the calendar year 1974, in violation of 26 U.S.C. § 7203.

The facts are brief and are not in dispute. The
government presented evidence to establish that Irwin had
income during 1974 in excess of \$22,000. Irwin's 1974 income
tax return was introduced into evidence. It contained
Irwin's name, address, and an entry indicating Irwin was
entitled to a refund of \$4,694. The return otherwise showed
only Irwin's constitutional objections to the questions asked.
In response to all questions dealing with Irwin's income for
1974 was the entry "Object-Self-incrimination". We will set
forth additional facts as they are pertinent to our discussion
of the issues Irwin raises on appeal.

The first issue Irwin raises concerns his request for
representation by lay counsel. Irwin represented himself at
trial as he does on this appeal. He argues that the trial judge's
denial of his request violated his Sixth Amendment right to
counsel. We have previously addressed such a contention and
determined that the Sixth Amendment does not provide the right
to representation by a lay person. "Counsel" refers to a
person authorized to practice law. *United States v. Afflerbach*,
547 F.2d 522 (10th Cir. 1976); *United States v. Grismore*,

546 F.2d 844 (10th Cir. 1976). The trial court did not err in denying Irwin representation at trial by a layman.

Irwin next argues that the trial judge erred in failing to recuse himself on the basis of Irwin's affidavit of prejudice. Section 144, Title 28 U.S.C., provides that a trial judge against whom a timely and sufficient affidavit is filed in good faith by a party demonstrating bias or prejudice against him or in favor of his adversary shall not hear the proceeding. The bias charged must be of a personal nature and must be such as would likely result in a decision on some basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Davis v. Cities Service Oil Co.*, 420 F.2d 1278 (10th Cir. 1970).

Irwin's affidavit of bias stated that he had previously filed an action for declaratory judgment on the question of whether he could refuse to answer questions on his 1974 income tax return on the basis of his Fifth Amendment privilege. That action came on for hearing before the same trial judge and was resolved against Irwin.

The fact that a judge has previously rendered a decision against a party is not sufficient to show prejudice. *United States v. Goeltz*, 513 F.2d 193 (10th Cir. 1975), cert. denied, 423 U.S. 830; *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425 (10th Cir. 1966), cert. denied, 386 U.S. 977. Further, it

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appears from the record that Irwin's declaratory judgment action was resolved not on the merits but on the threshold consideration that he failed to demonstrate the existence of a justiciable controversy. Irwin's affidavit fell short of the required showing of bias, and the trial judge committed no error in failing to withdraw from the proceeding.

Irwin sought to challenge the jury array pursuant to 28 U.S.C. § 1867(a). On August 2, 1976, he moved to compel disclosure of the jury selection materials and to obtain a continuance pending his examination of the materials. His motion for disclosure of the documents was granted; his motion for continuance was denied, and the trial proceeded August 3. He seeks reversal for the trial court's refusal to grant the requested continuance. His argument is that he was effectively denied an opportunity to examine the jury selection materials and prepare his motion for stay or dismissal of the information.

Irwin must make a clear showing that the trial court's refusal to grant the continuance constituted an abuse of discretion and resulted in manifest injustice in order to obtain a reversal on that ground. *United States v. Hill*, 526 F.2d 1019 (10th Cir. 1975), cert. denied, 425 U.S. 940. We do not believe he has made such a showing. At best, had the continuance been granted, Irwin could have filed his

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motion. His ground for challenge in the district court as well as on appeal is that the use of voter registration lists as a source for prospective jurors systematically excludes large segments of the populace, in derogation of the policy of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* Although Irwin did not file a proper motion challenging the jury array, the trial judge considered his contention regarding the use of voter registration lists and correctly rejected it. *United States v. Grismore, supra*; *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973), cert. denied, 416 U.S. 936. We must assume Irwin has now had an ample opportunity to examine the jury selection material. He cites no additional ground upon which to challenge the jury. He cannot have been prejudiced by the court's refusal to grant his continuance.

Irwin next argues that the trial judge erred in informing the jurors, by means of a pamphlet regularly mailed to prospective jurors before trial and also by jury instructions, that they were to decide the factual questions on the evidence presented but were to apply the law as the judge explained it to them. He contends the jurors should be free to decide the pertinent questions of law as well. His contention is simply contrary to the law. *United States v. Grismore, supra*; *Tyler v. Dowell, Inc.* 274 F.2d 890 (10th Cir. 1960), cert. denied

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363 U.S. 812; *Jones v. United States*, 251 F.2d 288 (10th Cir. 1958), cert. denied, 356 U.S. 919.

Irwin argues that he committed no crime in filing the 1974 tax return as he did, and therefore the judge improperly denied his motion to dismiss. Irwin's argument is that he is protected by the Fifth Amendment from disclosing the information requested and may not be subjected to criminal prosecution for the exercise of that right. Irwin places primary reliance on *Garner v. United States*, 424 U.S. 648 (1976), in which the Court held that a claim of privilege, if valid, could be made as to specific items of information requested on an income tax return. *Garner* dealt with a nontax prosecution for violation of federal gambling laws. The government sought to introduce the defendant's income tax return on which he listed his occupation as a gambler. Irwin misreads *Garner* to stand for the proposition that no information need be supplied on a tax return. A valid claim of privilege must be based upon a real possibility that submitting answers will subject the taxpayer to criminal prosecution. Irwin has made no showing which would approach justifying his claim of privilege in not supplying any information upon which the IRS can determine his tax liability.

The requirement that an income tax return be filed does not violate the Fifth Amendment because the information

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APPENDIX "B"

is requested in a non-accusatorial setting. *Pauldino v. United States*, 500 F.2d 1369 (10th Cir. 1974); *United States v. Smith*, 484 F.2d 8 (10th Cir. 1973), cert. denied, 415 U.S. 978. It is possible that a valid claim of privilege could be asserted as to specific items of information requested. *Garner v. United States*, *supra*. If such claim were valid, the taxpayer could not be prosecuted for violating 26 U.S.C. § 7203. However, it is well established that the Fifth Amendment cannot be stretched so far as to absolve a taxpayer's duty to file a return. *United States v. Sullivan*, 274 U.S. 259 (1927). Irwin's return, containing no information upon which his tax liability could be determined, constituted no return at all. *United States v. Porth*, 426 F.2d 519 (10th Cir. 1970), cert. denied, 400 U.S. 824. We find no merit in the contention that the present prosecution violates Irwin's privilege against self-incrimination. *California v. Byers*, 402 U.S. 424 (1971); *United States v. Sullivan*, *supra*; *United States v. MacLeod*, 436 F.2d 947 (8th Cir. 1971), cert. denied, 402 U.S. 907; *United States v. Porth*, *supra*.

Irwin's final contentions concern comments made by the trial judge in ruling on evidence. We have examined his contentions, and we find them to be without merit.

AFFIRMED.

JULY TERM- September 6, 1977

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Delmas C. Hill, Senior Circuit Judge,
The Honorable Oliver Seth, Circuit Judge,
The Honorable William J. Holloway, Jr., Circuit Judge,
The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge,
The Honorable William E. Doyle, Circuit Judge

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 vs.) No. 76-1933
)
 DONALD C. IRWIN,)
)
 Defendant-Appellant.)

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Hill, Seth and McWilliams to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Howard K. Phillips
Clerk

APPENDIX "C"

1.

APPLICABLE LAW, ETC.

UNITED STATES CONSTITUTION:

AMENDMENT I 2

Congress shall pass no law respecting...the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT V 23

...nor shall any person...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;..

AMENDMENT VI 8,12

In all criminal prosecutions the accused shall enjoy the right to a ...public trial, by an impartial jury..and to be informed of the nature and cause of the accusation; to have ...witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT IX 2

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

THE BILL OF RIGHTS 12

STATUTE PROVISIONS AS FOUND IN THE U. S. CODE:

26 USC 7203 5,22

28 USC 1254 3

28 USC 1651 3

2.

28 USC 1654 15

and Judiciary Act of 1789.

(Chap. 20, §35, 1 Stat. 92)

28 USC Rules of the Supreme Court 7

COMMON LAW 12

THE PENNSYLVANIA FRAME OF GOVERNMENT OF 1682: 13

That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends...

RULES OF THE SUPREME COURT 28

RULE 19

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No. 77-505

Supreme Court, U. S.
FILED

DEC 7 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

DONALD C. IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-505

DONALD C. IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks review of his conviction for failing to file an income tax return on the grounds that the evidence did not support the verdict and that the trial court erred in refusing to allow him to be represented by a non-lawyer.

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of willfully failing to file an income tax return for 1974, in violation of 26 U.S.C. 7203. He was sentenced to four months' imprisonment and fined \$2,000. The court of appeals affirmed (Pet. App. A, pp. 1-7).

The proof showed that petitioner, an electrician, had income during 1974 in excess of \$22,000. The Form 1040 that he filed contained his name, address, and an entry

indicating that he was entitled to a refund of \$4,694. The form showed nothing else except petitioner's objections to the questions asked. In response to all questions dealing with income, petitioner wrote "Object—Self-incrimination" (Pet. App. A, p. 2).

1. Petitioner contends (Pet. 22-27) that the evidence was insufficient to support the verdict. But this argument rests on the erroneous assumption that the claims of privilege set forth on his Form 1040 were valid so that he could not properly be convicted of failure to file a return. Petitioner's assumption is not supported by *United States v. Sullivan*, 274 U.S. 259, upon which he relies (Pet. 22). There, the Court affirmed the conviction of a bootlegger for failing to file an income tax return, holding that the Fifth Amendment did not protect him from the requirement of filing a return. In so holding, the Court stated that if the "form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all" (274 U.S. at 263).

Here, however, petitioner did not claim the privilege with respect to certain questions. To the contrary, he in effect asserted a blanket claim of privilege against filing any return at all. The Form 1040 petitioner filed gave no information from which a tax could be computed and was not a return within the meaning of the Internal Revenue Code or the Treasury Regulations. See *United States v. Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States v. Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824. This Court's opinion in *Sullivan* forecloses such an unsupported, blanket claim of privilege (274 U.S. at 263-264): "It would be an extreme if not an extravagant application of the

Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."

This Court's recent decision in *Garner v. United States*, 424 U.S. 648, is not to the contrary. In that case, the defendant's income tax returns, upon which he stated that he was a gambler, were introduced in evidence, over his Fifth Amendment objection, as proof of the federal gambling offense with which he was charged. The Court observed that although petitioner could have claimed the privilege against self-incrimination instead of answering the question as to his occupation, he failed to do so and elected to disclose the fact that he was a gambler. In those circumstances, the Court concluded that his disclosure was not "compelled" within the meaning of the Fifth Amendment. But *Garner* does not indicate that a taxpayer may refuse to state the amount of his income or disclose sufficient information from which the amount of his tax liability may be computed.

2. Petitioner further argues (Pet. 8-19) that the trial court erred in refusing to permit him to be represented at trial by a friend who was not a lawyer.¹ But a criminal defendant has no constitutional right to representation by

¹Petitioner also claims (Pet. 20-21) that he was the victim of discrimination because he was denied the right to be represented at trial by a non-lawyer friend, while the prosecutor was assisted by an employee of the Internal Revenue Service who was not a lawyer. But the Internal Revenue Service employee did not try the case; he only assisted the prosecution with some of the clerical details relating to the exhibits.

a non-lawyer. See, e.g., *United States v. Cooper*, 493 F. 2d 473, 474 (C.A. 5), certiorari denied, 410 U.S. 859; *United States v. Whitesel*, 543 F. 2d 1176, 1177-1180 (C.A. 6), certiorari denied, June 13, 1977 (No. 76-1378); *United States v. Ellsworth*, 547 F. 2d 1096 (C.A. 9), certiorari denied, 431 U.S. 931.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense." As the court of appeals pointed out (Pet. App. 2), the right to counsel guaranteed by the Sixth Amendment refers to a person authorized to practice law. *United States v. Afflerbach*, 547 F. 2d 522 (C.A. 10); *United States v. Grismore*, 546 F. 2d 844 (C.A. 10). The purpose of the guarantee is to ensure the availability, if it is sought, of the guiding hand of counsel at every critical step in the proceedings against a defendant, including "the giving of effective aid in the preparation and trial of the case." *Harrison v. United States*, 387 F. 2d 203, 212 (C.A. D.C.). This purpose is not met when the accused seeks to be represented by a non-lawyer. *United States v. Jordon*, 508 F. 2d 750 (C.A. 7), certiorari denied, 423 U.S. 843; *McKinzie v. Ellis*, 287 F. 2d 549 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.,
Solicitor General.

DECEMBER 1977.